No. 99-869

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

U S WEST COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner advises the Court that the Rule 29.6 statement filed with its petition for a writ of certiorari is still complete and accurate.

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The briefs in opposition depict this case as presenting only a garden variety question of statutory interpretation. Indeed, respondents suggest that a *marketing* arrangement between U S WEST Communications, Inc. ("U S WEST") and Qwest Communications Corporation ("Qwest") should be deemed to constitute the *provision* of long distance service under any "natural" construction of the term "provide" in section 271(a) of the Telecommunications Act of 1996 ("1996 Act").[1] Respondents are wrong about both the manner in which the Federal Communications Commission ("FCC") approached the statutory provision at issue in this case and the broader significance of this petition.

In the *Order* below, the FCC determined that U S WEST's marketing arrangement constituted the "provision" of long distance service, not because of any "natural" understanding of the words Congress used, but rather because the agency preferred to maximize U S WEST's "incentives" to seek agency approval under section 271. The D.C. Circuit, far from purporting to rely on the canonical meaning of the word "provide," took the FCC's manufactured ambiguity at face value and expressly invoked *Chevron*[2] deference in affirming the *Order*. *See* Pet. App. 2a-4a.

The agency made no bones about the genesis of its novel "involvement" standard. *See id.* at 47a-48a, 53a-54a. The roots

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[1] Brief for the Federal Respondents in Opposition ("Gov't Opp.") 11; *see also* Brief of AT&T Corp. and MCI WorldCom, Inc. in Opposition ("Int. Opp.") 12.

[2] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

of that standard lie not in any "interpretation" of the words Congress used — indeed, the agency's reading of the statute has nothing to do with those words as commonly understood or as defined by the terms and structure of the 1996 Act — but in the FCC's replacement of what Congress had written with what the agency believed Congress should have written. That assumption of legislative power is in plain derogation of both the nondelegation doctrine and sound principles of statutory construction.

ARGUMENT

1. Respondents, in an effort to deflect attention from the central issue in this case, attack an obvious straw man when they assert that U S WEST contended below that "provide" is synonymous with "transmit."[3] To the contrary, U S WEST noted that all definitions of the common verb "provide" share a core meaning: They refer to putting forth a product or service oneself, as contrasted to performing ancillary services for another who is doing so.[4] "Providing" can be done directly (by carrying long distance traffic over one's own facilities), indirectly (by reselling another's long distance transmission services), or — as the FCC itself had held until this case[5] — by entering into a revenue-sharing arrangement that would "intertwine" a BOC with a nominally unaffiliated long distance

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[3] *See* Gov't Opp. 10; Int. Opp. 12.

[4] *See* Pet. 19 (noting that the marketing agent of a telephone company does not "provide" service within the commonly understood meaning of that term).

[5] *See id.* at 20 (discussing FCC's interpretation of "providing service" in *Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, 12 FCC Rcd 3824, at ¶¶ 38-40 (1997)).

provider.[6] It is undisputed that U S WEST engaged in none of these activities: U S WEST received a flat fee per customer to market Qwest's services, while Qwest alone processed each customer's order, entered into the contractual relationship with the customer to provide long distance services, transmitted all of the customer's long distance calls, and received all revenues from the customer (and bore the risk of nonreceipt). *See* Pet. 9-10. Qwest provided its services under its own brand name, was identified as the long distance provider on all bills, and had full responsibility for maintaining and restoring long distance services. *See id.* at 10. The *Order* found U S WEST to be the "provider" of the services not because its activities fit any definition of that term but because that result would maximize U S WEST's incentives to seek relief under section 271.[7]

2. Like any other statutory interpretation case, this one involves a particular section of a particular statute (albeit a very important one). But the significance of this case is not limited to the 1996 Act. The decision below countenances a practice by which administrative agencies can manipulate the *Chevron* framework to *ignore* what Congress has enacted into law by characterizing as "ambiguous" any statutory provisions that do not suit their visions of good policy. The *Order* seized on the existence of multiple (but quite similar) dictionary definitions of the verb "provide" as a basis for declaring section 271(a)'s ban on "provid[ing]" certain long distance services to be "ambiguous." *See* Pet. App. 44a-46a. That declaration freed the agency from the constraint of interpreting section 271(a) by reference to what Congress meant in using that verb. Instead, the agency used the possibility that Congress *might* have meant

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[6] *See id.* at 19-20; *cf.* Int. Opp. 13 n.10 (mischaracterizing U S WEST's argument).

[7] Pet. App. 21a, 53a-55a.

"furnish" or "make available"[8] as an excuse to adopt a wholly new meaning — "involve" — that transformed the statute into what the FCC would have enacted had it, rather than Congress, drafted the law.[9] Although the FCC's formless "involvement" standard is unconnected to the words Congress used — indeed, the agency itself justified its statutory construction by reference to a free-floating notion of what Congress might have said but did not, *see id.* at 44a-45a, 53a-54a — the D.C. Circuit felt itself bound to affirm on the basis of *Chevron*.[10]

This case therefore exhibits a process of statutory construction turned upside down: No longer a search for the meaning of what Congress wrote, it is instead a quest to identify statutory ambiguity sufficient to justify *Chevron* deference.[11] If

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[8] *See id.* at 44a & n.107 (quoting The American Heritage College Dictionary).

[9] The government attempts to downplay the extent to which the *Order* equates "provide" with "involve." *See* Gov't Opp. 10-11. In fact, the FCC's test for judging whether a Bell Operating Company ("BOC") has violated section 271(a)'s ban on "providing" long distance service turns on the agency's evaluation of "the totality of [the BOC's] *involvement*" in the long distance market. *See* Pet. App. 54a (emphasis added).

[10] Respondents' efforts to pretend that the result below did not turn on the deference accorded the FCC ignore the FCC's brief below — which claimed deference, *see U S WEST Communications, Inc. v. FCC*, No. 98-1468, Brief for Respondents 36 (D.C. Cir. Feb. 18, 1999) — and the opinion below, which gave it. *See* Pet. App. 2a-4a.

[11] The government suggests that dicta in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 397 (1999), somehow mean that the FCC's efforts to resolve statutory ambiguities cannot implicate the nondelegation doctrine. The question there was not whether the authority delegated by Congress was sufficiently defined to satisfy the nondelegation doctrine — sections 251 and 252 plainly met that standard — but rather how to accommodate the tension between potentially inconsistent delegations to the states and the FCC. *Iowa Utilities* plainly did not suggest, much less hold, that the section of the 1996 Act

such a result-driven process is indeed shielded by *Chevron* — and the D.C. Circuit, like other courts, had no difficulty concluding that it was[12] — then any agency can rewrite any statutory provision that contains any degree of imprecision (which is to say almost any law) to mean almost anything. In effect, an agency can arrogate to itself the power to say what the law is notwithstanding what Congress has actually dictated. That assumption of fundamental lawmaking authority by an administrative agency goes far beyond the interstitial gap-filling contemplated in *Chevron* itself, and so shifts the locus of legislative power as to run afoul of the nondelegation doctrine.[13] This growing tendency is by no means confined to this particular administrative agency — the most recent example having been

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at issue here gives the FCC carte blanche to create "incentives" as the agency best sees fit.

[12] *See* Pet. App. 3a-6a; Pet. 13-17 & nn.17, 18, 20.

[13] This petition therefore raises even more troublesome delegation issues than those now presented for review by the government in *Browner v. American Trucking Ass'ns, Inc.*, No. 99-1257 (petition for cert. filed Jan. 27, 2000). In the *American Trucking* petition, the government asserts that the D.C. Circuit wrongly concluded that EPA's interpretation of the Clean Air Act was so broad as to be of questionable constitutionality under the nondelegation doctrine. In that case, the government states that the nondelegation doctrine "raises issues of extraordinary governmental concern." *See id.* at 9. In this case, the FCC's transformation of quite *specific* language in the 1996 Act into an expansive grant of discretion raises even larger questions under the nondelegation doctrine. *See* Pet. 26-27 & n.37. If the Court does not grant this petition outright, Petitioner respectfully submits that disposition of this petition should be held pending action on the government's petition in *American Trucking*.

the (just-retracted) view of OSHA that its statutory authority extended to "workplace" conditions in the home.[14]

Although the government contends that the *Order* is founded on some "intelligible principle" sufficient to satisfy the nondelegation doctrine,[15] it never identifies that principle (instead asserting vaguely that the FCC's reading of section 271(a) promotes the 1996 Act's general goals). That is because the *Order* in fact defines a roving mandate to investigate whatever BOC behavior the FCC thinks to be inconsistent with the spirit of the 1996 Act (as perceived by the agency) — even if such conduct otherwise would fall outside the FCC's statutory jurisdiction. *See* Pet. 28-29 (explaining that FCC's construction of section 271(a) reaches conduct such as billing and collection services that the agency does not or cannot regulate in any other context). Such a mandate necessarily runs afoul of the nondelegation doctrine because it is based on no "intelligible principle" *articulated by Congress*. Indeed, like the EPA

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[14] *See* Letter of Nov. 15, 1999, from Richard E. Fairfax, OSHA, to Mr. T. Trahan (indicating that OSH Act applies to a "workplace" in the home); Amy Joyce, *Reversal Sought on OSHA Telecommuting Rule*, Wash. Post, Jan. 5, 2000, at E1. Such examples notwithstanding, the intervenors, but notably not the government, suggest that the problem is really the opposite — that the courts of appeals give too little deference to agencies. *See* Int. Opp. 10-11. But the intervenors cannot blink the growing number of cases in which agencies manipulate *Chevron* to exploit the freedom that comes from declaring a statute ambiguous. *See* Pet. 14-16 & nn.18, 20. For example, in *Beverly Enterprises, Inc. v. NLRB*, 165 F.3d 290 (4th Cir. 1999) (*en banc*), the Fourth Circuit concluded that a "policy bias" had led the NLRB to adopt a misguided application of the statutory phrase "independent judgment." Significantly, in *Beverly Enterprises, Inc. v. NLRB*, 165 F.3d 960 (D.C. Cir. 1999), the D.C. Circuit upheld the same interpretation as applied to the same plaintiff.

[15] *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

decision struck down in *American Trucking Ass'ns v. EPA*,[16] the FCC's interpretation of section 271(a) is scarcely cabined by any limiting principle at all,[17] leading the court below to observe that the FCC's interpretation could be "nonsensical" if turned into "an excuse to stifle the BOCs at every opportunity," *see* Pet. App. 7a.[18]

3. The possibility that an agency may exploit a supposed ambiguity in a statute to adopt a hitherto unexpected legal interpretation also creates substantial uncertainty about the scope of the law and leaves private parties without reliable signposts to guide their behavior. In this case, for example, it not clear how any BOC could have predicted the statutory construction adopted below: The FCC's interpretation of section 271(a) to bar "involvement" does not comport with any dictionary meaning of "provide," with any common understanding of that term, or with the approach taken in prior

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[16] 175 F.3d 1027, *modified in part*, 195 F.3d 4 (D.C. Cir. 1999), *petition for cert. filed sub nom. Browner v. American Truckers Ass'ns*, No. 99-1257 (Jan. 27, 2000). The oppositions observe that U S WEST did not cite *American Trucking* until its petition for rehearing below, but they fail to note that *American Trucking* was decided almost two weeks *after* oral argument in this case. In any event, the nondelegation argument could be raised anew in this Court under the "enlargement" doctrine, *see Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 86 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in judgment), because it is merely an elaboration of the reasons why U S WEST's arrangement with Qwest cannot be deemed the "provision" of long distance services.

[17] *See* Pet. 26-29.

[18] The government takes issue with U S WEST's earlier citations to this passage, Gov't Op. 13, but the opinion below speaks for itself. *See* Pet. App. 7a (affirming the FCC's interpretation of section 271(a) "as a general approach" but finding that "too-broad a notion of 'competitive advantage' or 'incentive' could make [that interpretation] nonsensical").

FCC decisions. *See* Pet. 18-24.[19] Congress certainly could have enacted a broader prohibition of "involvement" in the long distance business, presumably giving some guidance about the extent of such a broad ban. That it chose instead only to bar the "provision" of long distance service was reasonable ground for a BOC in U S WEST's position not to expect that the FCC would transform that rifleshot prohibition into a blunderbuss Congress chose not to fire.

The government recites a litany of reasons why the *Order* advances important policy goals perceived by the FCC. *See* Gov't Opp. 11. But "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). The government's policy primer suggests why Congress *might* have chosen to ban BOC "involvement" in long distance, but it does not demonstrate that Congress in fact did so.[20] If anything, the government's opposition only underscores how far afield the FCC's statutory interpretation has strayed from what the statute says: The government seems to believe that statutory analysis should begin not with what Congress has written but with what the experts believe would be good law. As this case demonstrates, the result of such ends-oriented reasoning is a

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[19] The government asserts that the FCC's reading of the statute is the "natural" one. *See* Gov't Opp. 11. But a woman or man on the street would not regard Best Buy or Radio Shack, for example, as wireless service "providers," even though they sell cellphones, make it easy for consumers to sign up for wireless service, and provide customer assistance where phones are still under warranty. Nor does the FCC regulate them as such.

[20] To the contrary, the scope of section 271 is considerably narrower than were the preexisting line of business restrictions in the AT&T Consent Decree, *see* Pet. 7-8, 19, 23 — a point that the intervenors ignore, *see* Int. Opp. 13.

degree of uncertainty that undermines the legitimacy of administrative decisionmaking.

4. Finally, the government suggests that certiorari should be denied because U S WEST and Qwest have announced a plan to merge. *See* Gov't Opp. 10 n.6. But a merger would not moot this case, as the government seems to recognize. A claim for damages is pending below based on the joint marketing agreement between U S WEST and Qwest. *See* Pet. 10 & n.16. This Court has often noted that a claim for damages makes judicial review appropriate even where other relief has been mooted.[21] And a merger of U S WEST and Qwest would not alter by one iota the appropriateness of reviewing the approach to *Chevron* embodied in the decision below.

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The government's position in this case illustrates the damage that can stem from a tragedy of small decisions. The government appears to believe that, as Congress could have banned BOC involvement in long distance, it was perfectly lawful for the FCC to do so in Congress' name. But what the government portrays as the seemingly quotidian character of this decision in the name of *Chevron* is the whole point: It shows how far the focus of statutory analysis has shifted away from the statutory landmarks filled in by Congress to the regions Congress left blank. If each new point penciled in by an

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[21] *See, e.g., Ellis v. Brotherhood of Clerks*, 466 U.S. 435, 442 (1984); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982) (distinguishing the case cited by the government, *Taggart v. Weinacker's, Inc.*, 397 U.S. 223 (1970) (*per curiam*), in light of damages claim in *Havens*); *see also Calderon v. Moore*, 518 U.S. 149, 150 (1996) (*per curiam*) ("'even the availability of a 'partial remedy' is 'sufficient to prevent [a] case from being moot'") (alteration in original) (quoting *Church of Scientology v. United States*, 506 U.S. 9, 13 (1992)).

administrative agency appears to rest on *terra firma*, that is only because the entire doctrinal landscape has become so deformed that it is impossible to see that agencies are no longer bridging gaps between legislative landmarks but are instead plotting points on the open sea.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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